

Internal Revenue Service  
**memorandum**

date: SEP 06 1991

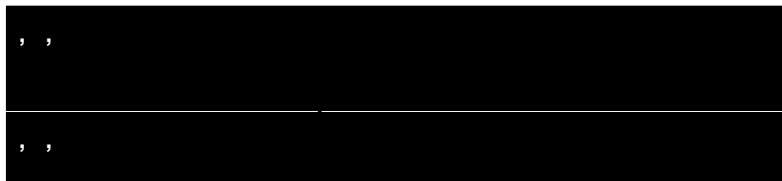
to: Director, Internal Revenue Service Center  
Kansas City, MO  
Attn: Entity Control

from: Technical Assistant  
Employee Benefits and Exempt Organizations

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subject: CC:EE:3 - TR-45-1085-91  
Railroad Retirement Tax Act Status

Attached for your information and appropriate action is a copy of a letter from the Railroad Retirement Board concerning the status under the Railroad Retirement Act and the Railroad Unemployment Tax Act of:



We have reviewed the opinion of the Railroad Retirement Board and, based solely upon the information submitted, concur in the conclusion that [REDACTED]

[REDACTED] is not an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act and the services performed by its employees are not creditable under the Acts.

(Signed) Ronald L. Moore

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RONALD L. MOORE

Attachment:

Copy of letter from Railroad Retirement Board

cc: Mr. Gary Kuper  
Internal Revenue Service  
200 South Hanley  
Clayton, MO 63105

08662

UNITED STATES OF AMERICA  
RAILROAD RETIREMENT BOARD  
844 RUSH STREET  
CHICAGO, ILLINOIS 60611

BUREAU OF LAW

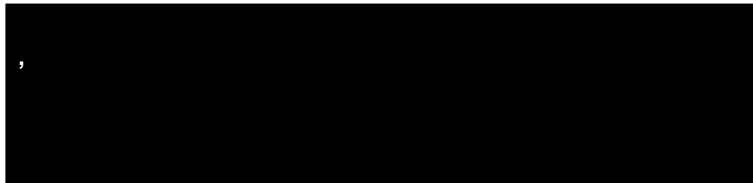
Assistant Chief Counsel  
(Employee Benefits and  
Exempt Organizations)  
Internal Revenue Service  
1111 Constitution Avenue., N.W.  
Washington, D.C. 20224

JUN 26 1991

Attention: CC:IND:1:3

Dear Sir:

In accordance with the coordination procedure established between the Internal Revenue Service and this Board, I am enclosing for your information a copy of an opinion in which I have expressed my determination as to the status under the Railroad Retirement and Railroad Unemployment Insurance Acts of the following:



Sincerely yours,

A handwritten signature in cursive script, appearing to read "Steven A. Bartholow".

Steven A. Bartholow  
Deputy General Counsel

Enclosure

UNITED STATES GOVERNMENT

RAILROAD RETIREMENT BOARD

**MEMORANDUM****L -** [REDACTED]

JUN 20 1991

TO: Director of Research and Employment Accounts

FROM: Deputy General Counsel

SUBJECT: [REDACTED]  
Employer Status

This is in reference to your Form G-215 requesting my opinion as to the employer status of the [REDACTED]. The status of [REDACTED] as an employer under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA) has not previously been considered.

Information about [REDACTED] was furnished by [REDACTED] Administrator for [REDACTED]. [REDACTED] stated that the [REDACTED] first became involved in railroad operations in [REDACTED] with the demise of the [REDACTED] at which time it became involved with a small freight railroad. In [REDACTED], the [REDACTED] was formally set up in the office of the State Secretary of Transportation. In [REDACTED], the law establishing the [REDACTED] was codified in the State's statutes. (See [REDACTED]).

According to [REDACTED], [REDACTED] does not operate trains. Rather, it contracts with railroads to operate the trains. [REDACTED] decides the schedules and fares and provides the funds for the trains to operate. [REDACTED] owns \$[REDACTED] of rolling stock, but does not own the track on which the trains run. The track is owned by the rail carriers which operate the trains. [REDACTED] stated that the majority of [REDACTED]'s [REDACTED] employees work in [REDACTED]'s office and that several do maintenance work on parking lots and signs. All employees who run and operate the trains, as well as the ticket sellers, are not employees of [REDACTED], but instead are employees of the railroads which operate those trains.

[REDACTED] indicated that the [REDACTED] (a commuter line between [REDACTED] in [REDACTED] and [REDACTED] in [REDACTED]) is run by [REDACTED] on [REDACTED] track and that [REDACTED] runs the [REDACTED] and [REDACTED] commuter lines on [REDACTED] tracks. The [REDACTED] line runs between [REDACTED] in [REDACTED] and [REDACTED] in [REDACTED], and the [REDACTED] line runs between [REDACTED] and [REDACTED].

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[redacted] and [redacted] in [redacted]. [redacted] provided copies of [redacted]'s agreements for the operation of the commuter railroads with [redacted] and with [redacted].<sup>1/</sup> Those agreements are quite detailed and need not be summarized here.

Both agreements call for the actual operation of the trains to be done by the respective railroads and not by [redacted]. More specifically, the [redacted] contract, dated [redacted], provided that [redacted] would provide regularly scheduled daily weekday commuter rail service on its [redacted] line between [redacted] and [redacted] and on the [redacted] line between [redacted] and [redacted]. The term of that Agreement was from [redacted] through [redacted]. The Agreement provided that it could be renewed by mutual agreement of the parties and approval of the [redacted] for [redacted] additional [redacted]-year periods. An amendment dated [redacted], made [redacted] the successor to [redacted].<sup>2/</sup> The [redacted] contract, dated [redacted], provides that [redacted] will provide regularly scheduled commuter service on its [redacted] between [redacted] and [redacted].

[redacted] also provided a copy of a portion of [redacted] for [redacted] - [redacted], which describes the [redacted] as follows:

"The [redacted] was formed in [redacted]. The [redacted] preserves and improves railroad transportation facilities and services in [redacted] and plans for and provides new facilities and services. Periodically, the [redacted] issues the [redacted] a comprehensive summary of its programs and objectives.

\* \* \* \* \*

<sup>1/</sup> [redacted], is an employer under the RRA and the RUIA, with service creditable from [redacted] to date. [redacted] was an employer from [redacted] to [redacted]. After a corporate reorganization, it was succeeded by [redacted].

<sup>2/</sup> [redacted], is an employer under the RRA and the RUIA, with service creditable from [redacted] to date.

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"[redacted] administers operating subsidies for [redacted] trains, renovates stations and parking areas, and coordinates plans to improve railroad lines and services in the [redacted] metropolitan region.

\* \* \* \* \*

"[redacted] funds the rehabilitation of freight lines, subsidizes their operations, and purchases rail lines. [redacted] works closely with other State agencies, local governments, and railroad transportation providers and users to enhance the role of railroads in economic and industrial development throughout the State. Proposals for railroad freight service changes or abandonments that would affect local communities and shippers also are monitored and reviewed by [redacted].

\* \* \* \* \*

"[redacted] administers all right-of-way and construction projects for passenger and freight services."

[redacted] also provided that portion of the [redacted] dealing with [redacted]. That report stated that [redacted] "monitors decisions by private railroads and works with them to promote and preserve essential rail service" (p. [redacted]). The report stated that the State had invested funds on a selective basis to retain rail service for local businesses on branch lines on the [redacted] and in [redacted]. That service, operated by small independent railroad companies, serves both small and large businesses who employ thousands of employees and provide other economic benefits to the communities where they are located. The report stated that two branch lines were then, or soon would be, operating without further state assistance (p. [redacted]).

Section 1 of the RRA defines the term "employer" to include:

"(i) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of chapter 105 of Title 49<sup>3/</sup> (45 U.S.C. §231(a)(1)(i)).

3/ Subparagraph (ii) deals with companies under common control with a rail carrier employer, and is not applicable to the facts of this opinion, as there is no evidence whatsoever that [redacted] is under common control with a rail carrier employer.

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Section 1 of the RUIA contains essentially the same definition (45 U.S.C. §351).

██████ does not fall within the definition of employer set forth in section 1 of the RRA and section 1 of the RUIA because it does not operate a railroad. Although it does own rolling stock, it does not own track and does not employ the individuals who run the trains. As such, ██████ is analogous to the ██████, which was determined in Legal Opinion L-██████ not to be an employer under the Acts where it had contracted with a covered employer to provide service over its track, but had not itself ever commenced rail operations and did not have the present capability to do so. It is therefore my opinion that the ██████ is not an employer under the RRA and the RUIA.

The question then becomes whether all or any of the ██████ employees of ██████ should be considered to be employees of the railroads which contract with ██████ to operate the commuter trains or which receive subsidies from ██████. Section 1(b)(1) of the RRA defines the term "employee" in pertinent part, as follows:

"The term 'employee' means (i) any individual in the service of one or more employers for compensation, (ii) any individual who is in the employment relation to one or more employers \* \* \*."

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3/ Continued.

It should also be noted that subparagraph (iii) of section 1(a)(1) does not apply to ██████. That section provides that any receiver, trustee, or other individual or body, judicial or otherwise, is an employer when it is in the possession of the property or operating all or any part of the business of any rail carrier employer. The information which has been provided indicates that ██████ is not in possession of the property of any employer; nor does it operate the business of any employer. Rather, ██████ promotes commuter and freight rail service within the ██████ through its contracts with ██████ and ██████ to operate commuter rail service and through subsidies provided to both freight and commuter rail services.

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Section 1(d)(1) of the RRA provides, in pertinent part, that:

"An individual is in the service of an employer  
\* \* \* if --

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation  
\* \* \*."

Section 1 of the RUIA contains essentially the same definitions.

The definition set forth in paragraph (A) quoted above may generally be described as the common law test. The focus of this test is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of the work but also with respect to the way the individual performs such work. The tests set forth under paragraphs (B) and (C) go beyond the common law test and would hold an individual to be a covered employee if the individual is integrated into the railroad's operations even though the control test in paragraph (A) is not met. In practice, this office in applying paragraphs (B) and (C) has followed Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F.2d 831 (8th Cir. 1953) and has not used paragraphs (B) and (C) to cover employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business and the arrangement has not been established primarily to avoid coverage under the Acts.

There is no evidence that any of the [ ] employees of [ ] is subject to the authority of any rail carrier to supervise and/or direct the manner in which he or she performs service. [ ] stated that the majority of [ ]'s employees work in [ ]'s office, presumably doing work necessary to administer the subsidies granted to railroads by [ ] and/or to administer the contracts which [ ] has with the railroads which operate the commuter trains discussed earlier in this memorandum. Similarly, there is no evidence that those [ ] employees who do maintenance work on parking lots and signs do so under the direction of any rail

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carrier employer; Nor is there any evidence that the definitions set forth in sections 1(d)(1)(i)(B) or (C) would apply to any of [REDACTED]'s employees, since there is no evidence that any of those employees provide technical or professional services or personal services on railroad property which are integrated into the staff or operations of a rail carrier employer.

Accordingly, it is my opinion that no service performed by employees of [REDACTED] is creditable under the RRA and the RUIA.

An appropriate Form G-215 is attached.



Steven A. Bartholow

Attachment